



## ▶ **THIRD**-party deposits

**In a recent commercial transaction, an initial deposit in the amount of \$90,000 was received. Under the terms of the agreement \$50,000 was released to the seller prior to closing. The buyer did not perform (bring in funds and documents to close) and required an extension.**

The principals negotiated an extension fee of \$75,000. The buyer only paid \$35,000 of the \$75,000 and the money came in from a third party. The third-party depositor signed the Third-Party Deposit instructions, but the buyer did not. The instructions authorized:

1. Use of funds for this particular transaction; and
2. Release of evidence of deposit to buyer's new lender to source the funds; and
3. Forfeiture of the deposit under terms of the purchase agreement; and
4. Refund of the deposit to the contract buyer

### **Amendment to the Contract created by the real estate agent read as follows:**

1. Extension Fee. In consideration for the extension of the Expected Closing Date (as set forth below), concurrently with the execution of this Amendment, Buyer will deposit with Escrow Holder additional Cash made payable to Escrow Holder in the sum of SEVENTY-FIVE THOUSAND DOLLARS (\$75,000.00) ("Extension Fee").

The Extension Fee is separate from the Deposit and shall be immediately released to Seller without the need for further instruction.

The Extension Fee will be applied against the Purchase Price and is non-refundable to Buyer.

2. Release of Deposit. The Buyer previously deposited with Escrow Holder the Deposit in the amount of \$90,000. A portion of the Deposit, in the amount of \$50,000, was previously released to Seller.

Upon execution of this Amendment, Escrow Holder will release the remaining Deposit, in the amount of \$40,000, to Seller without need for further instruction.

Buyer acknowledges that in the case of a default by Buyer, including a failure to close Escrow on or before the Closing Date, the Deposit will be considered liquidated damages as provided in the Purchase Agreement and Buyer shall have no claim to the Deposit.

The buyer never signed the third-party deposit instructions and despite the wording in the purchase agreement another set of Release of Funds Prior to Close instructions were required to release the extension fee and they were never signed.

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### **What does the Release of Funds Prior to Close actually say?**

1. The settlement agent makes no warranty or representation of any kind, express or implied as to the ownership of or title to the property described in this escrow, nor as to any encumbrances or liens thereon, nor as to the condition and/or the ultimate outcome of this escrow nor in any manner or form as an inducement to make the above payment.

2. Buyer fully realizes that no instruments have been filed or recorded in his favor, and no policy of title insurance has been issued to protect his interest in said property. Buyer nevertheless desires to accommodate Seller and release funds.

3. Settlement agent is not to be held liable or responsible for any loss or damage which Buyer may sustain by reason of making the payment, nor for failure of any of the conditions of this escrow, nor for the recovery of said money for any reason whatsoever.

The buyer could not come up with the down payment and the lender will not send documents without proof of funds deposited into escrow.

The buyer wants the extension fee returned to the depositor, so they do not have to repay it. The seller wants all the money in escrow. The transaction is definitely cancelling.

For this transaction, we are stuck making the decision to release the funds without proper instructions (\$40,000 initial deposit and \$35,000 partial extension fee); or hold the funds pending written mutual instructions; or interplead the funds with the court.